U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 17 April 2006

BALCA Case No.: 2005-INA-00084
ETA Case No.: P2003-NY-02496174

In the Matter of:

BEST WAITERS, INC.,
Employer,

on behalf of

MOMTAZ UDDIN,
Alien.

Appearance: Neil A. Weinrib, Esquire
New York, New York
For the Employer and Alien[1]

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman, and Vittone**[2]
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from Employer's request for review of the denial by a U.S. Department of Labor Certifying Officer ("CO") of alien labor certification for the position of

[1] The Board has pending before it five very similar cases involving Best Waiters, Inc. Mr. Weinrib represents the Employer and the Alien in Case Numbers 2005-INA-84 and 86. Ramesh K. Srestha represents the Employer and the Alien in Case Number 2005-INA-83. Sharif A. Laskar, President of Best Waiters, Inc., appears *pro se* in Case Numbers 2005-INA-85 and 88.

[2] Associate Chief Administrative Law Judge Thomas M. Burke did not participate in this matter.

Cook.[3] The CO denied the application and Employer requested review pursuant to 20 C.F.R. § 656.26.

STATEMENT OF THE CASE

On April 30, 2001, Employer, Best Waiters, Inc., filed an application for labor certification to enable the Alien, Momtaz Uddin, to fill the position of Cook. (AF 227). On the ETA 750A, Employer listed the "Nature of Employer's Business Activity" as "Catering Services." (AF 222). The hourly rate of pay was listed as $18.90. Employer requested "Reduction in Recruitment" ("RIR") processing. (AF 226).

On September 23, 2003, the CO issued a Notice of Findings ("NOF") proposing to deny certification based on the finding that Employer appeared to be an employment agency/job shop, which did not constitute an employer pursuant to 20 C.F.R. § 656.3. (AF 223). In rebuttal, Employer was directed to provide its Federal tax returns for 2001 and 2002. Employer was also directed to supply documentation of the number of employees during those years as well as currently, their job duties, and W-2 forms for 2001 and 2002. Current payroll records were requested along with responses to several questions, including how permanent full-time work was guaranteed, where the work was performed, and the geographic area the agency covered.

Employer submitted rebuttal on October 27, 2003.[4] (AF 102). Employer contended that it was a bona fide and active U.S. business organization that qualified as an "employer" pursuant to 20 C.F.R. § 656.3. Employer pointed out that it already had two employees, namely Employer's president and his wife. Employer stated that it also consistently employed, in the

[3] Alien labor certification is governed by Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and Title 20, Part 656 of the Code of Federal Regulations ("C.F.R."). This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2004). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[4] Employer's rebuttal erroneously refers to an Alien involved in another labor certification application. (AF 103). The issues, however, remain the same.

relationship of employer-independent contractor, a substantial number of other personnel, over whom Employer had hiring and firing authority. Employer explained that it was not an employment agency but a catering/food services company and that it was Employer, and not Employer's customers, who paid the staff their wages. According to Employer, its tax returns, which were attached, established that it paid $230,916.00 in 2002 and $349,216.00 in 2001 for subcontractors -- payments which it believed showed a legitimate business operation. Among the documents attached to the rebuttal were W-2s for Employer's president and wife and 1099-MISC forms for workers.

The CO issued a supplemental NOF ("SNOF") on March 18, 2004. (AF 99). Therein, the CO stated that a review of Employer's rebuttal revealed that Employer's president and his wife were in an employer/employee relationship with Employer and that the other workers were independent contractors. According to the CO, such workers were not considered employees, but were considered to be self-employed. Employer's 1099 forms indicated that these workers were "non-employees," and therefore, that an employer/employee relationship did not exist. The Federal tax return for 2002 provided by Employer did not show wages or salaries, but the supporting schedules showed deductions for payments to sub-contractors and sub-contractors. The CO found that there was no documentation that the cook in this particular application could be guaranteed 40 hours of work per week for 52 weeks per year. While the contracts submitted by Employer in rebuttal were found to guarantee several thousands of dollars of work, they covered various occupations and were not tied to any specific individual.

Employer was directed to provide information to document that an employer/employee relationship existed, and tax records showing that the workers who worked for it on a full-time permanent basis were in an employer/employee relationship. Employer was advised it could amend the requirements, if it so chose.

Employer submitted rebuttal on June 4, 2004. (AF 55). Employer reiterated its argument that it met the definition of "employer," further contending that its workers met the definition of employees, regardless of whether the workers were issued a Form 1099 or a W-2. Instead,

Employer contended that the degree of control exercised by an employer over an independent contractor or an employee is controlling. Employer indicated its willingness to re-advertise and pursue further recruitment as evidence of its willingness and desire to abide by federal regulations. Employer also submitted additional documentation of its business.

A Final Determination was issued on August 12, 2004. (AF 49). The CO found that while Employer produced a Quarterly Combined Withholding Wage Reporting and Unemployment Insurance Return, and an ADP payroll/personnel roster (which, the CO noted, did not include the subject Alien as an employee), the documentation did not establish that Employer could offer permanent full-time employment or that an employer/employee relationship existed. Thus, the application clearly did not meet the definition of employment as set forth in 20 C.F.R. § 656.3.

On September 22, 2004, Employer filed a Request for Review and this matter was forwarded to the Board of Alien Labor Certification Appeals ("Board"). (AF 1). Employer submitted an appellate brief through counsel, which was received by the Board on January 18, 2005. In its appellate brief, Employer argues that it is not an employment agency, as the CO apparently concluded, but an employer "in every sense of the term, legal and otherwise." Brief at 2. Employer argued that although it employs individuals in 1099 capacities, it also employs individuals on a full time, permanent basis, and that the Alien would be hired as a employee paid with a W-2. Employer argues that the CO ignored the evidence it provided in response to the NOF and Supplemental NOF, and that it meets the common law definition of "employer" notwithstanding how the wages are paid, citing 53 Am.Jur.2d, Master and Servant § 2. Employer argues that the Am.Jur. 2d text states that the "'payment of wages is the least important factor.'" Thus, Employer claims that "the method of remuneration, whether as W-2 or 1099 individuals should not be a deciding factor in determining whether an actual employer-employee relationship exists." Brief at 6.

DISCUSSION

In its request for review, Employer contends that the CO failed to properly consider the evidence and incorrectly interpreted applicable law. Employer argues that it meets the definition of "employer," and does, in fact, have employees, having provided the CO with W-2s for those employees. Employer reiterates that it has the power to hire and fire its 1099 personnel and pays their wages/salaries. According to Employer, its tax returns and other documents establish its ability to pay substantial salaries and other payments for its personnel. Employer contends that the CO's requirement that there be an existing employer/employee relationship between it and the Alien is improper, as the labor certification process represents a future job offer. Included with the request for review are documents not previously submitted before the CO.

Initially, it must be noted that the evidence which has been submitted for the first time with the request for review is not timely. This Board's review of the denial of labor certification is based solely on the record upon which the denial was based, the request for review and legal briefs. Thus, the Board will not consider additional evidence submitted in conjunction with a request for review. *Import S.H.K. Enterprises, Inc.*, 1988-INA-52 (Feb. 21, 1989) (*en banc*).

According to 20 C.F.R. § 656.3, "[e]mployment means permanent full-time work by an employee for an employer other than oneself." The employer bears the burden of proving that a position is permanent and full-time. If the employer's evidence does not show that a position is permanent and full-time, certification may be denied. *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988). The issue, therefore, is not whether Employer is a valid corporation licensed to do business in the State of New York; the issue is whether it has a position for a full-time cook. As the CO stated in its NOF, Employer needed to provide documentation that it could guarantee full-time work, i.e., 40 hours per day, five days per week, 52 weeks per year for this position.

In this case, and during the years questioned by the CO, Employer reported all of its workers' income, save that of Employer's president and his wife, via 1099-MISC forms. Form

1099-MISC is used for work performed by contractors or non-employees, as opposed to employees whose income would be reported on a W-2. Employer concedes that the only persons it employs who receive W-2s are Employer's president and his wife. The remaining workers are provided 1099-MISC forms, many of which are attached to Employer's rebuttal. Employer's argument that it has an employer/employee relationship with its independent contractors because it pays the wages and has the ability to hire and fire these individuals ignores the reality that this is normally the case with independent contractors hired by an employer. This does not make those workers full-time employees.

In *Manuel Da Cunha Construction*, 2003-INA-294, 2003-INA-295 (Sept. 29, 2004), certification was denied where the employer failed to show that the alien at issue was not a contractor, and the employer did not withhold social security or taxes from the alien's income. Similarly, in *Koam Poultry Technical Service*, 1990-INA-596 (July 17, 1992), it was determined that the employer failed to document that it was an "employer" within the meaning of the Act as it did not document that it withheld taxes, social security or other unemployment insurance for its workers.

In the instant case, Employer did not provide any evidence that Social Security and Medicare taxes were withheld from any of these independent contractors. Of significance is the documentation provided by Employer of its payments to its independent contractors. Thus, Employer has provided 68 1099-MISC forms for 2001, when it claims to have paid a total of $349,216.00 to its subcontractors, and 62 1099-MISC forms for 2002, when it claims to have paid a total of $230,916.00 to its subcontractors. Dividing these amounts by the number of independent contractors, this amounts, on average, to $5,135.53 per person and $3,724.25 per person respectively during those years. Reviewing the actual 1099-MISC forms submitted reveals that not one individual earned sufficient income to warrant a finding that that individual was employed full-time, let alone that any one individual was employed full-time as a cook. Therefore, Employer has failed to document that it is capable of providing full time employment for the position at issue.

This application was before the CO in the posture of a request for RIR. While the CO did not directly deny that request, given that she denied the application labor certification, it is apparent that her intent was to deny the RIR as well. While this Board has directed that once the CO denies the RIR, the application should be remanded to the local office for processing, *see Compaq Computer Corp.*, 2002-INA-253, 261 (Sept. 3, 2003), certain exceptions apply. One of those exceptions is where the application is so fundamentally flawed that a remand would be pointless. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004) (finding a lack of a *bona fide* job opportunity). In the instant case, Employer has failed to demonstrate that it is offering permanent, full-time employment, and the application is thus so fundamentally flawed that a remand would be pointless.

Based upon Employer's failure to establish that permanent full-time employment exists, we find that certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals

800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.